

The Administrative Law Judge denied respondent's request to assess liability against the Kansas Workers Compensation Fund. The respondent and insurance carrier request the Appeals Board review that denial and contend the Kansas Workers Compensation Fund should be responsible for benefits due claimant as a result of a back injury claimant sustained while attending physical therapy for treatment of a work-related injury to his right knee. The sole issue now before the Appeals Board is liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

The facts are uncontroverted. Claimant injured his right knee at work on June 5, 1992, and subsequently underwent surgery. During physical therapy for the knee, claimant injured his back on January 6, 1993. The respondent did not know claimant had a pre-existing condition or impairment to his back.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

“‘Handicapped employee’ means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

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15. Loss of or partial loss of the use of any member of the body;
16. Any physical deformity or abnormality;
17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.”

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the pre-existing physical or mental impairment. See K.S.A. 1992 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the pre-existing impairment but the resulting disability or death was contributed to by the pre-existing impairment. See K.S.A. 1992 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the pre-existing impairment. K.S.A. 1992 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), Aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

Although provisions imposing liability upon the Workers Compensation Fund are to be liberally construed, the Workers Compensation Act should be interpreted in such manner to carry out its primary and basic purposes. As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

In the case now before us, claimant's back injury sustained during physical rehabilitation of the knee would have occurred regardless of whether respondent retained claimant in its employment. There is no relationship between the knee and back injuries other than claimant was participating in physical rehabilitation of the knee at the time of the back injury. Because there is no relationship or connection between the back injury and the hiring or retention of claimant in respondent's employ, the Appeals Board finds the respondent, and not the Workers Compensation Fund, should be responsible under this factual situation for the back injury. To hold otherwise would be to convolute the intent and purpose of the Workers Compensation Act.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated July 27, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jerry L. Soldner, Garden City, KS
 James H. Morain, Liberal, KS
 Gary R. Hathaway, Ulysses, KS
 Thomas F. Richardson, Administrative Law Judge
 George Gomez, Director